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No. 96-370

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF MIDWEST MOTOR EXPRESS, INC. IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, Midwest Motor Express, Inc. ("Midwest") moves for leave to file a brief *amicus curiae* in support of Petitioner Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund.

The named Petitioners have consented verbally to the filing of a brief *amicus curiae* on behalf of Midwest. Respondent has not consented.

Midwest is an interstate motor carrier of freight located in Bismarck, North Dakota, operating in thirteen states. Midwest was inolved in a labor dispute that lasted nearly three years beginning on August 12, 1991, and ending with

the National Labor Relations Board certification that the Midwest employees decertified the union on April 15, 1994. Until that date, Midwest's employees were members of the International Brotherhood of Teamsters ("Teamsters"), and participated in the Central States Southeast and Southwest Areas Pension Fund ("Central States"). Central States assessed withdrawal liability against Midwest later in April 1994. Central States could not have assessed withdrawal liability against Midwest prior to April 15, 1994, because of the labor dispute exception to withdrawal liability. ERISA § 4218(2), 29 U.S.C. § 1398(2).

However, if applied to Midwest's facts, the decision of the Ninth Circuit that the statute of limitations begins to run from the date of complete withdrawal would have deprived Central States of nearly one-half of the six-year statute of limitations for pension funds to sue withdrawing employers. ERISA § 3401(f), 29 U.S.C. § 1451(f). This would have encouraged Central States to assess withdrawal liability against Midwest as soon as possible to protect the fund against the running of the statute. Central States' suit for the collection of withdrawal liability against Midwest while Midwest was fighting a labor strike either would have overwhelmed Midwest or would have forced it to capitulate to the Teamster demands it otherwise resisted in the absence of a lawsuit.

The labor dispute exception is critical for employers engaged in a strike. Its procedure provides an important check and balance against hasty, unilateral action by plan trustees.

The Ninth Circuit's decision in the case at bar conflicts with the labor dispute exception and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The resolution of this case has serious implications for the continued viability of the labor dispute exemption to withdrawal liability as well as assuring that ERISA not be interpreted in such a manner as to undermine the collective bargaining process.

This case presents a critical question regarding the accrual of a cause of action under MPPAA. Midwest believes that the decision of the court below, if permitted to stand, will have a significant and substantial negative impact upon the future of multiemployer plans, upon the resolution of future labor disputes and upon future interplay between MPPAA and the collective bargaining process.

Accordingly, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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Legislative History:

H.R. Rep. No. 869, 96th Cong., 2nd Sess. 51, 63, *reprinted in* 1980 U.S. Code Cong. & Ad. News, 2919, 2931 8

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BRIEF *AMICUS CURIAE* OF MIDWEST MOTOR EXPRESS, INC. IN SUPPORT OF PETITIONER[1]

STATUTORY PROVISION INVOLVED

Section 1398 of Title 29 of the United States Code provides:

> **Withdrawal not to occur merely because of change in business form or suspension of contributions during labor dispute**
>
> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

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[1] As required by Supreme Court Rule 37.6, *amicus curiae* Midwest Motor Express, Inc. states that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

(1) an employer ceases to exist by reason of—

(A) a change in corporate structure described in section 4069(b) [29 U.S.C. § 1369(b)], or

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions or obligation to contribute under the plan, or

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398.

INTEREST OF *AMICUS CURIAE*

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, North Dakota, operating in thirteen states. Midwest is interested in this case because the Ninth Circuit decision conflicts with the labor dispute exception and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law, nor intended by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Midwest was involved in a labor dispute that lasted nearly three years, from August 12, 1991, until April 15, 1994. ERISA § 4218(2), 29 U.S.C. § 1398 (2). In Midwest's situation, the Ninth Circuit rule that the statute of limitations period on withdrawal liability collection actions begins to run from the date of complete withdrawal would have deprived the Central States Southeast and Southwest Areas Pension Fund ("Central States")

of nearly one half of the six-year statute of limitations. ERISA § 4301(f), 29 U.S.C. § 1451(f). This would encourage a prudent pension fund to assess withdrawal liability as soon as possible to protect itself against the running of the statute. Under those circumstances, the subsequent suit for the collection of withdrawal liability either would have overwhelmed Midwest or would have forced it to capitulate to union demands it otherwise might have resisted in the absence of the lawsuit. By contrast, the rule regarding the accrual of a claim advocated by Petitioner and applied in the District of Columbia Circuit, among others, allowed Central States to observe the labor dispute exception without losing any part of its statute of limitations.

The resolution of the case at bar has serious implications for the continued viability of the labor dispute exception to withdrawal liability, and that resolution should ensure that ERISA not be interpreted in such a manner as to undermine the collective bargaining process.

Accordingly, *amicus* believes it will bring insights and information beyond what is presented by Petitioner and Respondents, which will be useful to the Court in deciding the issue presented.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision that the statute of limitations begins to run from the date of complete withdrawal is fundamentally flawed because it is in direct conflict with the ruling of this Court in *Milwaukee Brewery Workers' Pension Fund v. Jos Schlitz Brewing Co.*, 513 U.S. 414 (1995). In *Jos Schlitz Brewing Co.*, the Court stated that a withdrawing employer owes nothing to a pension fund until such time as the fund demands that the employer pay its withdrawal liability. *Id.* at 423. Moreover, the Ninth Circuit's holding that the pension fund's cause of action accrues as of the date of the employer's withdrawal conflicts with the labor dispute exception codified

in ERISA and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by ERISA.

Finally, the Seventh Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. den.*, 510 U.S. 1115 (1994), provides a better alternative to the Ninth Circuit's flawed holding regarding accrual of the causes of action than the alternative presented by the Third Circuit's decision in *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994). The Third Circuit's approach adopts an analogy to installment payments which has no warrant in ERISA and is factually inapposite to the case at bar. In sum, a cause of action accrues at the time the employer fails to make a demanded payment, and the six-year statute of limitations runs from that date for the entire amount of the withdrawal liability.

ARGUMENT

I. THE NINTH CIRCUIT HAS ADOPTED AN INAPPROPRIATE STANDARD FOR DETERMINING THE ACCRUAL OF A CAUSE OF ACTION FOR WITHDRAWAL LIABILITY.

Under ERISA, as amended by MPPAA, an employer withdrawing from an under-funded multiemployer pension plan is responsible for paying the pension fund the employer's pro rata share of the funding deficit, so-called withdrawal liability, after it withdraws. ERISA § 4201, 29 U.S.C. § 1381. The pension fund has the right to sue the withdrawing employer to recover the withdrawal liability if the employer fails to pay on demand. ERISA § 4301(a)(1), 29 U.S.C. § 1451(a)(1). Section 4301(f) of ERISA, 29 U.S.C. § 1451(f), gives the pension fund six years to sue the withdrawing employer from the time the fund is injured. ERISA § 4301(f), 29 U.S.C. § 1451(f). ERISA does not specify, however, what act

or omission creates a claim upon which the pension fund can sue, thereby starting the running of the six-year statute of limitations.

In the case at bar, *Bay Area Laundry & Dry Cleaning Pension Fund v. Ferbar Corp.*, 73 F.3d 971 (9th Cir. 1996), the Ninth Circuit held that "the limitations period begins to run from the date of complete withdrawal. . . ." *Bay Area Laundry*, 73 F.3d at 973. The Ninth Circuit's holding, however, directly conflicts with this Court's statement in *Jos. Schlitz Brewing Co.*, that "the statute [ERISA] makes clear that the withdrawing employer *owes nothing until its plan demands payment. . . .*" *Jos. Schlitz Brewing Co.*, 513 U.S. at 423 (emphasis added). The Ninth Circuit's decision in this case assumes a diametrically opposed view of a withdrawing employer's obligations, which view, if allowed to prevail, threatens serious harm to the statutory framework established by Congress to protect the participants and beneficiaries of multiemployer pension plans. Moreover, the practical implications of the Ninth Circuit rule threaten to imbalance the system of collective bargaining between employers and their unionized employees which frequently depends on the parties using the economic weapons at their command to attain their bargaining objectives. Until *Ferbar*, multiemployer pension funds have had little reason to inject themselves into collective bargaining disputes, but the Ninth Circuit has offered multiemployer pension funds a perverse incentive to interfere in labor disputes to the unique detriment of the employer. This outcome is directly antagonistic to the statutory mandate that multiemployer pension funds may not assess withdrawal liability against an employer solely because the employer has suspended contributions on account of the pendency of a labor dispute. ERISA § 4218(2), 29 U.S.C. § 1398(2).

A. The Ninth Circuit's Analysis of ERISA's Statute of Limitations is Fundamentally Flawed.

For a claim for withdrawal liability to accrue, there must first be an injury to the fund. This is explicit in

section 4301(a)(1) of ERISA, 29 U.S.C. § 1451(a)(1), which states in pertinent part, "[a] plan fiduciary, employer, plan participant, or beneficiary, who is *adversely affected by the act or omission of any party* under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief or both." ERISA § 4301(a)(1) 29 U.S.C. § 1451(a)(1) (emphasis added). ERISA makes clear that a potential plaintiff must be "adversely affected" by "an act or omission" of a person, such as a withdrawing employer, in order for a claim against the withdrawing employer to accrue. In *Ferbar*, the Ninth Circuit, relying on its holding in *Board of Trustees of the Construction Laborers Pension Trust Fund v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), ruled, in effect, that the fund was adversely impacted by the employer's withdrawal from the fund. *Ferbar*, 73 F.3d at 973. In *Thibodo*, the Ninth Circuit rejected an alternative approach to the question of when the statute of limitations started running on the grounds that "[i]t is anomalous to conclude that the limitations period of [ERISA] § 1415(f) was running against the Trustees before they had a right to sue." *Thibodo*, 34 F.3d at 917. The Ninth Circuit decided *Thibodo* without the benefit of this Court's decision in *Jos. Schlitz Brewing Co.*, but, in light of that ruling, it is clear that the Ninth Circuit has done in *Ferbar* what it found "anomalous" in *Thibodo*. Under *Jos. Schlitz Brewing Co.*, the employer owed nothing, and therefore the fund had not been injured, until the fund had demanded payment. *Jos. Schlitz Brewing Co.*, 513 U.S. at 423. Nonetheless, the Ninth Circuit's ruling in *Ferbar* indicates that the statute of limitations starts running against the pension fund before it is owed any withdrawal liability, much less before it has been injured by non-payment of the liability. This fundamental conflict between the Ninth Circuit's decision in *Ferbar* and this Court's decision in *Jos. Schlitz Brewing Co.* requires the reversal of *Ferbar*.

B. The Ninth Circuit's Rule Regarding Accrual of a Cause of Action For Withdrawal Liability Encourages Multiemployer Pension Funds to Interfere in Collective Bargaining Disputes.

If a pension fund determines during the pendency of a labor dispute that the employer has permanently ceased contributing and that at the end of the labor dispute the employer will cease to have an obligation to contribute, the pension fund may decide that the employer has withdrawn as of the date it ceased contributing. Under the rule accepted in the District of Columbia,[2] Seventh *(Navco)* and Third Circuits *(Kahle Engineering)*, there is no cause for concern by the pension fund: the statute of limitations does not begin to run until such time as the pension fund makes a demand on the withdrawing employer. Under the Ninth Circuit approach, however, the pension fund must make its decision regarding withdrawal, with its attendant difficulties of interpreting collective bargaining disputes and the intentions of the employer, fairly soon after the suspension of payments. This is not an abstract concern. At the expiration of Midwest's collective bargaining agreement in 1991, Midwest bargained with its employees' union for several months until the employees went out on strike. Midwest stopped contributing to its multiemployer fund as soon as its employees went out on strike on August 12, 1991, as it was allowed to do under its pension fund's trust agreement. However, it was after nearly three years had passed, and the National Labor Relations Board certified that Midwest's employees had decertified the union on April 15, 1994, that the pension fund decided that Midwest had withdrawn in 1991. Until that time, Central States was barred from assessing withdrawal liability against Midwest by section 4218(2) of ERISA, 29 U.S.C. § 1398(2), so long as Midwest had only suspended its contributions during the dispute rather than permanently withdrawn from the fund.

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[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. den.* 493 U.S. 918 (1989).

Under the Ninth Circuit rule, Central States would have lost half of its statute of limitations during the strike.

The most serious danger presented by the Ninth Circuit rule, however, is not that pension funds will be left at the end of a labor dispute with no recourse against a withdrawing employer. While that is possible, and undesirable, the danger really lies with the funds' reasonable efforts to protect themselves from precisely that outcome. If, under the Ninth Circuit rule, a fund fears that a prolonged labor dispute is going to result in a withdrawal of the employer from the fund some years after the initial cessation of contributions, the prudent pension fund should demand withdrawal liability at once to protect itself against the running of the statute. The filing of a muli-million dollar suit[3] against the employer while the employer is fighting a strike either would overwhelm the employer or force it to capitulate to union demands it might otherwise resist in the absence of the lawsuit. This scenario conflicts with the labor dispute exception and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by ERISA. Congress clearly intended that ERISA, as amended by MPPAA, should not undermine the collective bargaining process: "Multiemployer plans are creatures of collective bargaining. The committee believes: that the integrity of the collective bargaining process must be preserved to the utmost extent consistent with assuring the financial soundness of multiemployer plans to meet benefit commitments." H.R. Rep. No. 869, 96th Cong., 2nd Sess. 51, 63, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2919, 2931.

This interference with the collective bargaining process is a result which should, and can, be avoided while protecting the rights of pension plans to recover withdrawal liability. All that needs to be done is to adopt the rule

[3] Multi-million dollar withdrawal liability assessments are not uncommon in some industries, such as trucking.

on accrual of withdrawal liability claims developed and applied by the District of Columbia (*Joyce*), Seventh (*Navco*) and Third Circuits (*Kahle Engineering*). If the cause of action accrues only when the pension fund demands payment and the employer fails to comply, then the fund can stay out of the labor dispute, as Congress intended when it enacted section 4218(2) of ERISA, 29 U.S.C. § 1398(2), without putting its ability to recover withdrawal liability at risk.

II. THERE IS NO BASIS IN LAW OR FACT FOR ADOPTION OF A STATUTE OF LIMITATIONS THAT BEGINS TO RUN ANEW FOR EACH PAYMENT MISSED BY A WITHDRAWING EMPLOYER.

The District of Columbia Circuit ruled in *Joyce* that the statute of limitations for suits to collect withdrawal liability begins to run from the date the withdrawing employer has failed to make a payment of withdrawal liability demanded by a pension fund. *Joyce*, 871 F.2d at 1124. Both the Seventh and Third Circuits have adopted the holding and reasoning of the D.C. Circuit. Although the Seventh and Third Circuits agree that *Joyce* correctly decided when the cause of action accrues, they disagree whether there is a unitary claim for the entire amount of withdrawal liability or whether a separate claim arises for each payment under a fund's amortization schedule.

In 1993, the Seventh Circuit held, in *Navco*, that "[t]he pension fund had only one *claim* against the employer . . .: the amount of withdrawal liability. Although a fund may permit an employer to amortize this sum over 20 years, 29 U.S.C. § 1399(c)(1)(B), the whole amount is presumptively due at the outset." *Navco*, 3 F.3d at 172 (emphasis in original). Under *Navco*, therefore, a pension fund has six years to sue a withdrawing employer for the entire amount of withdrawal liability beginning

from the date the employer misses its first scheduled payment.

A year later, in *Kahle Engineering*, the Third Circuit held that

> under the statutory scheme established by the MPPAA, a plan sponsor has six years from the date a payment is due to sue for its recovery. Absent a decision by the [pension] Fund to accelerate, the cause of action for payments not yet due does not begin to run when the first such payment is missed.

Kahle Engineering, 43 F.3d at 861. The Third Circuit's approach is based upon an extended analogy between the voluntary amortization of withdrawal liability which a pension fund must offer a withdrawing employer and an installment contract. This analogy is flawed as a matter of law, and even if appropriate on the facts of *Kahle*, has no appropriate application in this case.

First, the installment plan analogy drawn by the Third Circuit in *Kahle Engineering* is flawed because there is no basis in the statute for such an analogy. As noted by the Seventh Circuit in *Navco*, "[t]he [payment] schedule under [29 U.S.C.] § 1399(c), by contrast, is not contractual; the employer did not assent to a longer period for payment and suit." *Navco*, 3 F.3d at 172. More important, in the case at bar there is no factual predicate for application of the analogy at all. In some cases, such as *Kahle Engineering* itself, in which a withdrawing employer has made at least one periodic payment of withdrawal liability according to the amortization table provided by the pension plan, there may be a factual and legal basis for the Third Circuit's installment payment statute of limitations.[4] Under such circumstances, there may be some basis for assuming that there has been some quasi-contractual offer, acceptance and consideration sufficient to justify the treatment of the payment of withdrawal liability as an installment payment plan.[5] The case at bar, however, is not such a case: the withdrawing employer made no payments of any kind towards satisfaction of its withdrawal liability. *Ferbar*, 73 F.3d at 972. Accordingly, there is no basis for assuming that the employer and the pension fund took any action that could support the imposition of the installment payment statute of limitations on the parties. In this case, the pension fund offered an amortization schedule, as required by ERISA, but the employer never took any action to accept the extended payment schedule. Under the circumstances of the case at bar, imposition of the *Kahle Engineering* approach to the statute of limitations is without any justification.

[4] In *Kahle Engineering*, the employer paid at least one quarterly payment as required by the pension plan. *Kahle Engineering*, 43 F.3d at 855.

By contrast, the approach adopted by the Seventh Circuit in *Navco* fits *Ferbar* exactly. In its *Kahle Engineering* opinion, the Third Circuit objected to the *Navco* approach because, it argued, the Seventh Circuit had made acceleration of the withdrawal liability debt at default mandatory. This is simply inaccurate. ERISA itself left acceleration to be optional with the pension fund.[6] Under the *Navco* approach, the pension plan has the option of suing only for the amount of the one payment that has been missed, but, if the pension plan chooses to sue, it

[5] The proffer of an amortization alternative to a lump-sum payment could be considered an offer which the withdrawing employer accepts by making the demanded payments. This offer and acceptance is supported by consideration: the employer pays interest and the pension fund accepts deferred payment of the total liability. Although these quasi-contractual aspects of the process may be overstated, in *Kahle Engineering* they provide some justification for the installment-payment approach.

[6] Section 4219(c)(5) of ERISA, 29 U.S.C. § 1399(c)(5) provides that "[i]n the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest . . . ." ERISA § 4219(c)(5), 29 U.S.C. § 1399(c)(5) (emphasis added).

must do so for any remaining amounts that go unpaid within six years of the original default. This hardly makes mandatory what is optional under the statute. If a pension plan wishes to rehabilitate the delinquent employer it may do so, but it must sue for the entire amount of withdrawal liability within six years. This is hardly draconian; rather it sets a reasonable time limit within which the pension plan may exercise its efforts to recover the maximum amount from the employer before resorting to litigation. If the pension fund cannot work something out within that time, or even a fraction of that time, common sense suggests that nothing can be worked out.

CONCLUSION

The Ninth Circuit's analysis of when a cause of action for withdrawal liability accrues is fundamentally flawed because it is in direct conflict with the ruling of this Court in *Jos. Schlitz Brewing Co.* that a withdrawing employer owes nothing to a pension fund until such time as the fund demands that the employer pay its withdrawal liability. Moreover, the Ninth Circuit's holding that the pension fund's cause of action accrues as of the date of the employer's withdrawal conflicts with the so-called labor dispute exception codified in ERISA and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by ERISA

Finally, the Seventh Circuit's *Navco* decision provides a better alternative to the Ninth Circuit's flawed holding regarding accrual of the cause of action than the alternative presented by the Third Circuit's decision in *Kahle Engineering*. The Third Circuit approach adopts an analogy to installment payments which has no warrant in ERISA and is factually inapposite to this case. In sum, under ERISA's withdrawal liability provisions, a cause of action accrues at the time the employer fails to make a demanded payment, and the six-year statute of limitations

runs from that date for the entire amount of the withdrawal liability.

Respectfully submitted,

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